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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FORT WAYNE BOOKS, INC.,
Petitioner,

v.

STATE OF INDIANA,
STEPHEN GOLDSMITH, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS' ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the National District Attorneys' Association.*

The National District Attorneys' Association is the national service organization for our country's local prosecutors.

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* The assistance in the preparation of this brief of Donald M. Snemis (Notre Dame '88) and Mark L. Collier (Notre Dame '88) is hereby acknowledged.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." 18 U.S.C. § 1961 *et seq.* Congress found that "the sanctions and remedies available" under the law then current to control sophisticated forms of crime were "unnecessarily limited in scope and impact." 84 Stat. 923 (1970). Since 1970, the Federal government has used RICO in criminal prosecutions against organized crime groups, political corruption schemes, white-collar business offenses, and terrorist groups.[1] The Federal government has also brought civil suits to free unions dominated by criminal groups.[2]

Since 1970, twenty-seven states, including Indiana, have followed Congress' lead by adopting similar, but not identical legislation.[3] The states have employed this legislation in criminal prosecutions against a wide variety of illegal conduct.[4]

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[1] *United States v. Brooklier*, 685 F.2d 1208, 1213 (9th Cir. 1982) ("La Cosa Nostra"), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Mandel*, 591 F.2d 1347, 1353, *aff'd by an equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979) (Governor of Maryland), *cert. denied*, 445 U.S. 961 (1980); *United States v. Tamura*, 694 F.2d 591, 594 (9th Cir. 1982) (kickbacks from Japanese corporation); *United States v. Marubeni America Corp.*, 611 F.2d 763, 764 (9th Cir. 1980) (payoffs by Japanese corporation); *United States v. Bagaric*, 706 F.2d 42, 46 (2nd Cir.) (Croation nationalist), *cert. denied*, 104 S. Ct. 283 (1983).

[2] *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279, 282 (D. N.J. 1984), *aff'd*, 780 F.2d 267 (3rd Dist.), *cert. denied*, 106 S. Ct. 2247 (1986).

[3] Blakey and Cessar, *Equitable Relief under Civil RICO*, 62 Notre Dame L. Rev. 526, 596 (1987) (Federal and state statutes collected and analyzed) (cited as "Equitable Relief").

[4] *See, e.g., Carlson v. State*, 405 So.2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey v. State*, 402 So.2d 1178, 1180 (Fla. 1981) (drugs); *State v. Whiddon*, 384 So.2d 1269, 1270 (Fla. 1980) (theft, burglary, arson, and scheme to defraud); *Moorehead v. State*, 383 So.2d 629, 630-31 (Fla. 1980) (auto theft).

One of the most important aspects of Federal and state RICO legislation is its forfeiture sanctions.[5] Proceeds and other interests that can be related to racketeering activity may be forfeited to the government. *See Russello v. United States*, 464 U.S. 16, 28 (1983) ("RICO . . . was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.") Although not clearly articulated, petitioners essentially contend that Indiana's RICO forfeiture provisions may not be used consistent with the First and Fourteenth Amendments in two areas: (1) as a sanction for "obscenity" violations, or (2) where any offender invests his ill-gotten gains in expressive materials or a business dealing in expressive materials. The National District Attorneys' Association finds these contentions simply wrong. Accordingly, it urges this Court to reject the notion that those who distribute "obscenity"—found to do so in a manner fully consistent with constitutional safeguards—are somehow above the law. Similarly, it urges this Court not to create an expressive materials or business 'safe-haven" for those who profit from violations of the law.

STATEMENT

For the statement of the facts and course of legal proceedings below, the Court is respectfully directed to the brief of the Respondent Stephen Goldsmith.

Restated, one issue is raised:

Do the forfeiture provisions of Indiana RICO work a prior restraint in violation of the First and Fourteenth Amendments?

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[5] 18 U.S.C. § 1963(a) (1982). *See generally*, Blakey, "Asset Forfeiture Under the Federal Criminal Law" in H. Alexander and G. Caiden, The Politics and Economics of Organized Crime 127 (1985).

The National District Attorneys' Association urges this Court to answer this question in the negative.

This brief will address the factual background upon which this critical issue must be examined and resolved.

SUMMARY OF ARGUMENT

Prior to this Court's 1957 decision in *Roth*, prosecutions for "obscenity" of genuinely literary works were common. Since *Roth*, the character of "obscenity" prosecutions and of the material distributed has changed dramatically. Today, "obscenity" prosecutions involve only "hard-core" pornographic material. Such "obscenity" is characterized by little more than graphic sex acts, including but not limited to, intercourse, cunnilingus, fellatio and various forms of sado-masochism.

The abuse of children and the rape and degradation of women fill the pages of this "hard core" material. The definition of "obscenity" under *Roth*—and now *Miller* and *Pope*—limit the discretion of prosecutors, courts and juries in determining "obscenity." The test for "obscenity" now applied under the First and Fourteenth Amendments prevents the sort of abuse that was common under the reign of *Hicklin*. Currently, materials found "obscene" are appropriately and easily characterized as totally lacking in literary, artistic, political, scientific, or other value.

The sex industry is not a matter confined to "consenting adults." Typically, pornography performers are young people, who are poor and in desperate need of quick cash. Lured to the scene by the promise of money, they are forced into performing sex acts that they neither expected nor agreed to. In addition, performers are often supplied with drugs and are coerced into prostitution. Even if they are lucky enough to escape the industry, participation in such pornography haunts these people for the rest of their lives.

Organized crime figures control the sex industry. Through pornography, they make huge profits, launder illegally-gotten monies, and skim profits to defraud the government. Organized crime figures keep a tight rein on the sex industry through violence, which often includes murder. Profits from pornography then fund other organized crime activities, including gambling, the sale of drugs, prostitution, and public corruption.

ARGUMENT

I. THE *HICKLIN* TEST FOR OBSCENITY HAS BEEN REPLACED BY CAREFULLY DRAWN, WORKABLE, STANDARDS UNDER *ROTH-MILLER-POPE*

The protection of pornographic materials as an expression of free speech by this Court is a relatively recent phenomenon. Until 1957, the standards enunciated by Chief Justice Cockburn in *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360, dominated the law of "obscenity." Under *Hicklin*, the test for "obscenity" was: "[W]hether the tendency of the matter charged . . . [was] to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands . . . [it] may fall." *Id.*

The reign of the *Hicklin* test can only be described as a tyranny of the censorious. The list of genuinely literary works suppressed is long—and hardly justifiable. The works prosecuted include Erskine Caldwell's *God's Little Acre*, James Joyce's *Ulysses*, Radclyffe Halls *The Well of Loneliness*, and Theodore Dreiser's *An American Tragedy*.[6] The oppression became so great that intel-

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[6] *See, e.g., Attorney General v. Book Named "God's Little Acre"*, 326 Mass. 281, 93 N.E.2d 819 (1950) (prosecution of Erskine Caldwell's *God's Little Acre*); *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2nd Cir. 1934) (The book *Ulysses* by James Joyce was subject to an

lectuals, artists, teachers, civil libertarians, and others overreacted. Instead of seeking to rationalize a ban on the degradation of sex, they sought, without qualification, to overturn the ancient power to act against obscenity. Courts, too, began to question the *Hicklin* test. *See, e.g., United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913) (Hand, J.). The criticism of the *Hicklin* test soon found its way to this Court in *Butler v. Michigan*, 352 U.S. 380 (1957). The prosecution involved the prearranged sale of Griffin's *The Devil Rides Outside* to an inspector of Detroit's police censor bureau. The assistant district attorney applied a common-sense variation of the *Hicklin* test in deciding that the book was illegal. He felt that if he would not want his thirteen-year-old daughter to read it, then it would be illegal. *Id.* at 383. The effect was to reduce the entire adult population of Michigan to reading only what was fit for children. *Id.*

On June 24, 1957, this Court handed down its historic *Roth-Alberts* decisions. 354 U.S. 476. For the first time, this Court squarely defined "obscenity" and excluded it from the scope of the protections of the First and Fourteenth Amendments. "Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484. The Court rejected the *Hicklin* test for "obscenity," and it adopted its own test: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489.

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obscenity prosecution but adjudged not to be obscene); *People v. Friede*, 133 Misc. 611, 233 N.Y.S. 565 (1929) (*The Well of Loneliness* by Radclyffe Hall was found to be obscene despite the fact the prosecution admitted that the book was a "well written, carefully constructed piece of fiction with no unclean words" and the book's literary value was attested to by critics and artists); *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (*An American Tragedy* by Theodore Dreiser found to be obscene by the Massachusetts Supreme Court).

In 1973, the Court re-evaluated the constitutional definition of "obscenity" in *Miller v. California*, 413 U.S. 15. In *Miller*, the Court reformulated the test:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest . . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value. *Id.* at 24. (citations omitted)

The Court also squarely rejected the notion that the First or Fourteenth Amendments embodied a "consenting adults" test in *Miller*'s companion decision of *Paris Adult Theatre I v. Slaton*, 413 U.S. 48, 57 (1973).[7]

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[7] In *Paris*, this Court took notice of the argument against "obscenity" regulation based on the finding of the President's Commission on Obscenity and Pornography (Report at 27) that empirical research had not established a causal relation between exposure to "obscenity" and deviate sexual behavior or crimes of violence. 413 U.S. at 60-65. The Attorney General's Commission on Pornography found the 1970 conclusion to be "starkly obsolete." Final Report at 226 (1986) (cited as "1986 Pornography Comm. Report") The 1986 Commission reviewed the social and behavioral science research available subsequent to 1970, and it presented a much more nuanced perspective. *Id.* at 1034-35 (degree of harm is a function of the degree of the presence of violence, degradation, submission, domination and humiliation).

Prior to the publication of the 1986 Commission's final report, Gray & Company, a Washington, D.C. public relations firm, put together for media clients a national campaign to discredit the work of the Commission. Its themes found fault with all aspects of the Commission's efforts. Final Report of the Attorney General's Commission on Pornography, xlvi-xlviii (Rutledge Hill Press ed. 1986) (Introduction by M. McManus). Even a superficial awareness of the general treatment in the media of the Commission's work warrants the conclusion that the campaign's goals were largely realized. In fact, the work of the Commission warrants careful

The Court's most recent decision interpreting the *Roth-Miller* test is *Pope v. Illinois*, 107 S. Ct. 1918 (1987). In *Pope*, the Court qualified *Miller*: "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Id.* at 1921. As such, the Court clarified that the first and second prongs of the *Roth-Miller* test are issues of fact to be determined by contemporary community standards, while the third prong of the *Roth-Miller* is an objective test relying on the reasonable person standard.

"Obscenity" prosecutions in the United States have changed dramatically since this Court handed down its landmark decisions in *Roth* and *Miller*. Indeed, since the *Miller* decision was announced in 1973, Federal and state obscenity prosecutions are almost entirely limited to "hard-core" pornography.[8] These prosecutions involve material graphically portraying explicit homosexual and heterosexual intercourse, oral and anal intercourse, sodomy, fellatio, cunnilingus, and masturbation.[9] Many of these cases also involved instances of sado-masochism, bondage, group sex, seminal ejaculation and instances of sexual conduct between members of the same sex.[10] Under

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study and a balanced evaluation. For example, a panel of researchers gathered together by the Surgeon General after the report of the 1986 Commission essentially agreed with the new social science conclusions, particularly as they correlated the presence of violence in "obscenity" and sexual aggression. *Id.* at xviii. The resolution of these sorts of factual conflicts, of course, is a matter for the legislature. 413 U.S. at 60-65.

[8] 1986 Pornography Comm. Report at 1291.

[9] *Id.* at 1291-1295, n. 1518 (citing a lengthy list of cases involving prosecutions for "hard-core" pornography).

[10] *Id.* The change in the character of "obscenity" from "soft-core" to "hard-core" pornography with an increased emphasis on

the *Roth-Miller* standard, material involving nudity without explicit sexual activity or language is not judged obscene.[11]

The movie "Deep Throat" is a typical example of a "hardcore" movie consistently held to be obscene.[12] In "Deep Throat," scenes of explicit sex run from the beginning to end of the film and included cunnilingus, fellatio, and sexual intercourse, during which both heterosexual and homosexual activity occurs with multiple partners.[13] The heroine is played by Linda Lovelace (now Marchiano). After the opening scene, Lovelace walks into a home where a male is engaged in performing cunnilingus on another woman named "Ellen." After several scene changes, Lovelace is shown nude on her hands and knees and a male is engaged in anal intercourse with her. Her pubic area is shaved and close camera shots are shown of the genitals. The male ejaculates on her buttocks. Ellen is shown performing fellatio on one male and engaging in sexual intercourse with another simultaneously. The scene continues with the actors engaging in various other sex acts. Lovelace is portrayed as having intercourse fourteen or more times during the scene.

Lovelace is then shown visiting a psychiatrist to learn why she has never had an orgasm. After an examination,

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violence is the result of its inevitable effect. *See supra* note 7. "Obscenity" desensitizes those who use it and the community within which they live to the conduct portrayed. Each new release must, therefore, "go further" if it is to have an effect. As such, the risk run is that as it grows more bizarre, it will ultimately influence aggressive behavior itself.

[11] *Id.* at 1295,n. 1528.

[12] *See, e.g., People v. Thomas*, 37 Ill. App.3d 320, 346 N.E.2d 190 (1976); *Magwm v. States Attorney for Baltimore City*, 275 Md. 450, 341 A.2d 786 (1975); *Coleman v. Wilson*, 123 N.J.Super. 310, 301 A.2d 555 (1973).

[13] 1986 Pornography Comm. Report, at 1716-1726.

the doctor explains that her clitoris is in her throat, and he tests his theory by having her perform fellatio on him. He explains that she needs to learn to "deep throat." Deep throat, he explains, is the act of fellatio with the penis inserted into the throat. The doctor offers Lovelace a job at his office where she can fulfill herself sexually.

Throughout the rest of the film, Lovelace engages in various acts of sex, including having a specimen jar inserted in her vagina and filled with soda. A tube is inserted into the jar and both Lovelace and another male drink from the tube. She also engages in group sex, performing acts of cunnilingus, fellatio and intercourse. Lovelace is shown shaving her pubic hair in front of a patient pretending to be a burglar. The man tells Lovelace he is going to rape her, and she consents to her own violation. The man then becomes upset that she is not frightened. Lovelace performs acts of fellatio and intercourse with the rapist. The movie portrays Lovelace as being so satisfied with the would-be rapist that she falls in love with him and wants to marry him.

"Deep Throat" is but one movie among thousands of movies, magazines, and films depicting explicit sex. The titles of films reflect their content: "A Coming of Angels" to "Youthful Lust," "Bizarre Bondage," "Color Climax," "Dirty Girls," etc.[14] Similar "hard-core" obscenity may be found in hundreds of magazines, the titles of which range from "A Cock Between Friends" to "69 Lesbians Munching." [15]

Today, sexually explicit material also includes graphic sex by children, how-to-do-it rape manuals, and other magazines that dehumanize women. Indeed, a well-known pornographic magazine several years ago contained a step-by-step photographic manual of rape techniques, including how to tie the woman up.[16] Instances of rape and child molesting where "obscenity" play an integral part abound. For example, "On one occasion the Michigan State Police apprehended a rapist in the very act: he had the woman tied down and had the magazine propped up nearby, opened to the how-to-do-it pictures." [17]

[14] *Id.* at 1505-1612.

[15] *Id.* at 1505-1545.

This Court's decision in *Jenkins v. Georgia*, 418 U.S. 153 (1974) demonstrates, moreover, that "obscenity" prosecutions must be limited to "hard-core" pornography. In *Jenkins*, the Court reversed an "obscenity" conviction involving the movie "Carnal Knowledge." The Court noted that the movie was considered one of the top ten movies of 1971, received a number of favorable reviews, and an actress was nominated for an Academy Award for her role in the movie. *Id.* at 158 n.5. The Court held as a matter of law that the movie was not obscene under the *Miller* standard.

Prosecutions for "obscenity" under today's standards are marked by significant differences from those brought under the *Hicklin* test. No longer is there a serious danger that literary works with social value or importance will be adjudicated obscene. The overwhelming majority of "obscenity" prosecutions, in short, involve "hard-core" pornography with no literary, artistic, political or scientific value, and they reflect fact-patterns where serious disputes about the character of the material is not present. Moreover, under *Jenkins*, juries no longer have discretion to find that legitimate works with literary value are obscene. Today, a jury's determination that material is obscene may be reviewed by the trial court and appellate courts and overturned if inappropriate.

The blunt truth is that *Roth-Miller* has worked and is working well. The line between what is "obscene" and what is not is clear enough in practice. Accordingly, the

[16] W. Stanmeyer, The Seduction of Society 40 (1984) (cited as "Stanmeyer").

[17] *Id.* at 24.

sphere of "obscenity" is now so well-marked off that no intellectual, artist, teacher, or librarian ought have any legitimate fear that his or her work will be the subject of an "obscenity" prosecution.

II. THE SEX INDUSTRY IS CHARACTERIZED TODAY BY YOUTH, POVERTY, DRUG USE, PROSTITUTION AND PERSONAL DEGRADATION

A popular myth exists in this country that performers in so called adult films and magazines are well-paid men and women who freely choose to be involved in the pornography industry. That male fantasy is tragically false. More often than not, actors and actresses in pornographic films and models in pornographic magazines are young people who are involved in pornography simply because they are poor. *See Vernon v. Bethell*, 2 Eden 110, 113 (Ch 1761) (Lord Northington) ("necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit any terms that the crafty may impose of them"). In addition, pornographers regularly use mental and physical force to coerce actors and models to perform their sexual roles.

Youth is a prerequisite for a porn "star." Experts say that the age of porn performers is generally between the late teens and early twenties.[18] Enforcement of age limitations is typically lacking. For instance, in a California case a pornographer was prosecuted for using a fourteen-year-old girl for a pornographic magazine.[19] In another, an Oklahoma couple forced their daughters to engage in family sex while photographs were taken for pornography; the four girls were ages ten to seventeen.[20]

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[18] Sampson, "Commercial Traffic in Sexually Oriented Materials in the United States" in 3 Technical Report of the Commission on Obscenity and Pornography 186 (1971).

[19] *People v. Fixler*, 128 Cal. Rptr. 363, 56 Cal. App. 3d 321 (2d Dist. 1976).

[20] Letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography, cited in 1986 Pornography Comm. Report, at 780.

These young people get involved in the sex industry because they are poor and need money quickly. For instance, actor Sylvester Stallone, who once performed in a pornographic movie, said he only did it because he was literally starving.[21] A former porn model has indicated that most women come into the porn business under financial stress.[22] She gave two examples. One woman had a child in the hospital; the other was an illegal alien who could not otherwise find a job. The pornography industry is lucrative, but porn performers rarely share in the huge profits made by the pornographer. For example, the movie "Deep Throat" made millions at the box office,[23] but the "star" of the film, Linda Lovelace (now Marchiano), was hardly paid anything for her role.[24]

Porn producers prey on those who use or are dependent on drugs. Often, the only pay a porn performer gets is

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[21] Stallone said, "It was either do the movie or rob someone." Playgirl, Oct. 1985, at 30.

[22] The former pornography performer stated:

> A lot of women are hurt or crazy-women under stress. Yes, most women come in under a lot of stress. They're usually desperate when they first come in—maybe they need money for some emergency, like I did, or they've gone as long as they can doing odds and ends or working at (menial) jobs, and they finally just have to pay their bills. I met a woman whose kid was in the hospital, and I met lots of women who were financially strapped. There were also many illegal aliens there who couldn't work regular jobs even if they had the skill because they didn't have their green cards. . . . [T]hey certainly know how to get you to do what they want. Some women are so bad off that they just go immediately into hard-core films.

Lederer, "Then and Now: An Interview with a Former Pornography Model," in Take Back the Night: Women on Pornography 58-59 (1980).

[23] "The Pornography Industry", The Boston Globe (1983), at 31 (cited as "Boston Globe Report").

[24] 1986 Pornography Comm. Report, at 467 (testimony of Linda Marchiano).

drugs.[25] Pornographers use and exploit women in yet another way. It is a natural—and often coerced—step from pornography to prostitution.[26]

Pornography can destroy a person's future. Involvement in pornography lessens a young actor's or actress' employment prospects in legitimate films and roles. Many companies will not hire a person if he or she has participated in pornography.[27] Participation in pornography haunts a person for the rest of his or her life. The result of one mistake made by a person, when they were young, gives rise to a constant fear that friends, parents, spouses or children will later discover that mistake—a porn film or photograph.

Young women are often forced to participate in pornography. Runaways are picked up by pimps and exploited. Sometimes, when women agree to appear nude, they are coerced or forced to participate in sex acts that they neither expected nor agreed to.[28] Women have even

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[25] Stanmeyer, at 40; National Advisory Committee on Criminal Justice Standards and Goals, Organized Crime: Report of the Task Force on Organized Crime 12 (1976) (cited as "Organized Crime Task Force Report").

[26] Stanmeyer, at 40; Organized Crime Task Force Report, at 12.

[27] C. Hix, Male Model 166 (1979). Jimmy Grimme, owner of the Grimme Modeling Agency, added:

> I won't take a model if I find out he's done any porno films or if he's ever modeled in a gay magazine. I won't touch him. . . . Let's face it, if you're spending a million a year and you're picking a theme boy, you want to make sure that that boy has not appeared in some magazine completely unclothed, lying there like: Take me. It doesn't keep up the image.

Id. at 168.

[28] A man who participated in over one hundred porn films over two and a half years told the 1986 Pornography Commission:

> I have seen it totally destroy too many lives, but mostly the girls (sic). It's a lot harder on young ladies. I have seen a lot of producers and directors and photographers, just to get

reported being imprisoned, beaten, and abused sexually when they try to escape pornography. Linda Marchiano, for example, reported to the 1986 Pornography Commission that she was imprisoned and beaten when she tried to get out of her "Deep Throat" role. She stated, "Used and abused by Mr. Traynor (her husband at the time and the director of "Deep Throat") (my) captor, (I) was forced through physical, mental, and sexual abuse and often at gunpoint and threats of (my) life to be involved with pornography."[29] When making porn material depicting sado-masochistic abuse, women and girls are in fact tortured and suffer permanent physical damage.[30]

Andrea Dworkin, the author of *Men Possessing Women*, summed up the way women are treated in producing pornography in the United States in the 1980s:

> [I]n this country where I live, every year millions of pictures are being made of women with our legs spread. • • • Millions and millions of pictures are made of us in postures of submission and sexual access so that our vaginas are exposed for penetration, our anuses are exposed for penetration, our throats are used as if they are genitals for penetration. • • •
>
> [W]omen are penetrated by animals and objects for public entertainment, women are urinated on and defecated on, women and girls are used interchange-

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> out a product that they have in mind, either badger or almost force the girls into doing things that they would really rather not do. I, myself, have been on a couple of sets where the young ladies have been forced to do even anal sex scenes with a guy which is rather large and I have seen them crying in pain and just (sic) totally destroys their personality when they are forced to do things like that.

1986 Pornography Comm. Report, at 773 (Los Angeles Hearing).

[29] 1986 Pornography Comm. Report at 787 (testimony of Linda Marchiano).

[30] *Id.*, at 787-788 (Los Angeles Hearing).

ably so that grown women are made up to look like five- or six-year-old children surrounded by toys, presented in mainstream pornographic publications for anal penetration. • • •

[T]here is a trade in racism as a form of sexual pleasure, so that the plantation is presented as a form of sexual gratification for the black woman slave who asks please to be abused, please to be raped, please to be hurt. • • •

Pornography is used in rape—to plan it, to execute it, to choreograph it, to engender the excitement to commit the act. Pornography is used in gang rape against women. We see an increase since the release of "Deep Throat" in throat rape—where women show up in emergency rooms because men believe they can penetrate, deep-thrust, to the bottom of a woman's throat. • • •

We have seen in the last eight years, an increase in the use of cameras in rapes. And those rapes are filmed and then they are put on the marketplace and they are protected speech—they are real rapes. • • •

We see pornography having introduced a profit motive into rape. We see that filmed rapes are protected speech. We see the centrality of pornography in serial murders. There *are* snuff films. • • •

[W]e see women also suffering the injury of objectification—that is to say we are dehumanized. We are treated as if we are subhuman, and that is a precondition for violence against us. • • •

The civil impact of pornography on women is staggering. • • •

I . . . ask . . . you to help the exploited, not the exploiters. • • • [31]

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[31] *Id.*, at 769-772 (testimony of Andrea Dworkin) (emphasis in original). Dworkin's points may be made more concrete from a law enforcement perspective. A manifest effect of the "obscenity" distributed today is the desensitizing of those who come into contact with it and others in the community. *See supra* note 7. Whatever

III. ORGANIZED CRIME GROUPS CONTROL THE SEX INDUSTRY THROUGH EXTORTION AND VIOLENCE, INCLUDING MURDER, WHILE REAPING HUGE PROFITS TO FINANCE OTHER ILLEGAL ACTIVITIES, INCLUDING GAMBLING, THE SALE OF NARCOTICS, AND PROSTITUTION

Among law enforcement veterans and other crime experts, little doubt exists that organized crime figures control the sex industry. James Fratianno, one of the highest-ranking organized crime figures to ever testify against La Cosa Nostra, was asked about the sex industry by the 1986 Pornography Commission. Fratianno estimated that ninety-five percent of the organized crime families are involved in porn; he also confirmed the huge amount of profit organized crime reaps from pornography.[32]

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the correlation between "obscenity" and aggressive acts, a clearly measured relationship is present of increased callousness. In turn, that callousness will inevitably translate into fewer jury verdicts in charges of sex offenses where defenses of consent are interposed. (How was she harmed, anyway?) A legislature can make spousal abuse or rape illegal, when it involves those who previously knew each other (date rape). It should not be forced to accept fewer guilty verdicts in these sensitive areas because of the effects of "obscenity," regardless whether the "consumer" is consenting or not. What is consumed by a few will, in fact, ultimately effect how the rest of us are treated. Juries that are drawn from a desensitized community will treat these offenses differently. No caring community ought to be forced to accept that result. For a summary of relevant research *see* Pornography Comm. Report (1986).

[32] Fratianno testified:

Interviewer: Could you describe the nature and type of involvement organized crime would have in the pornography industry when you were active in organized crime?

Fratianno: Well, it's very, very big. . . . I'd say, ninety-five percent of the families are involved in one way or another in the pornography. . . . It's too big. They just won't let it go.

[Continued]

A 1978 FBI report concluded: ". . . [O]rganized crime involvement in pornography . . . is indeed significant, and there is an obvious national control directly and indirectly by organized crime figures of that industry in the United States."[33] A former FBI agent told the 1986 Pornography Commission:

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[32] [Continued]

Interviewer: Okay, does organized crime reap a lot of money from their involvement in the pornographic industry?

Fratianno: Absolutely, Absolutely.

1986 Pornography Comm. Report, at 1052-1053 (testimony of James Fratianno). The 1970 Commission indicated that there was "no concrete evidence" of an organized crime connection to the sex industry. Report at 141-43. In fact, FBI experts provided the Commission with evidence that it chose to ignore. 1986 Pornography Comm. Report, at 1042.

[33] Federal Bureau of Investigation, The Extent of Organized Crime Involvement in Pornography (1978) (unpublished) (cited as "1978 FBI Report"). The Report draws its conclusions from a survey of FBI field offices across the country. The Report indicates, "Information obtained during the course of the enclosed survey points out the vast control of the multi-million dollar pornography business in the United States by a few individuals with direct connections with what is commonly known as the organized crime establishment in the United States, specifically, La Cosa Nostra.". *Id.*, at b. The Report continued:

> Few pornographers can operate in the United States independently without some involvement with organized crime. . . . More importantly, the huge profits gathered by organized crime from this area and then redirected to other lucrative forms of crime, such as narcotics and investment in legitimate business enterprises, is certainly cause for national concern even if there is community apathy toward pornography.

Id. at k.

The point may be made more concretely. Michael Thevis, one of the nation's largest and most violent pornographers, once told a meeting of organized crime figures that he owned 90% of the movie viewmatic machines in the country; he was interrupted by Robert DiBernado, who reminded him that he might have "proprietary rights" in the machines, but they were owned by the family."

[Continued]

> In my opinion, based upon twenty-three years of experience in pornography and obscenity investigations and study, it is practically impossible to be in the retail end of the pornography industry (today) without dealing in some fashion with organized crime either the mafia or some other facet of non-mafia never-the-less highly organized crime.[34]

State and local law enforcement officials concur. High-ranking police officials in Chicago and Los Angeles have made similar statements.[35]

Independent state reports corroborate the F.B.I. survey and the testimony of individual police officials. The 1983 Report to the Governor of Ohio concluded: "[T]he nation's growing pornography industry is dominated by East Coast organized crime families."[36] The Report also noted: "[T]his lucrative business is a major source of

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[33] [Continued]

1986 Pornography Comm. Report, at 1062. On DiBernado, *see* text *infra* at nn. 54-58. Thevis was ultimately convicted of Federal RICO; one of the predicate offenses was the murder of the principal witness against him. *See United States v. Thevis*, 665 F.2d 616, 622-24 (5th Cir. 1982), *cert. denied*, 456 U.S. 1008 (1982).

[34] 1986 Pornography Comm. Report, at 1047 (testimony of William P. Kelly).

[35] *See, e.g.*, Thomas Bohling, of the Chicago Police Department's Organized Crime Division, who testified, ". . . [I]t is the belief of state, federal, and local law enforcement that the pornography industry is controlled by organized crime families. If they do not own the business outright, they most certainly extract street tax from independent smut peddlers." 1986 Pornography Comm. Report, at 1048; Chief Daryl F. Gates of the Los Angeles Police Department, who testified, "Organized crime infiltrated the pornography industry in Los Angeles in 1969 due to its lucrative financial benefits. By 1975, organized crime controlled eighty percent of the industry and it is estimated that this figure is between eighty-five to ninety percent today.", *Id.*, at 1048-1049 (Los Angeles Hearing).

[36] The Law Enforcement Consulting Committee, Organized Crime: Report to the Governor of Ohio 69 (1983) (unpublished) (cited as "1983 Ohio Report").

income for organized crime throughout the United States." [37] A 1986 Report on Organized Crime in California by the State's Attorney General concluded, "Organized crime is heavily involved in adult videotape distribution nationwide, and in production primarily in Southern California." [38].

Official reports are corroborated by investigative reporting. For example, the Boston Globe published an extensive series on pornography in 1983. During the investigation, the Globe found that pornography was tied to organized crime. Its report concluded: "[P]ervasive evidence indicates that many of these businesses are controlled or heavily influenced by organized crime, which has been active in the industry for years, especially in the distribution of films, magazines, and so-called marital aids." [39]

The obvious motive for organized crime involvement in pornography is profit. The pornography industry produces between seven and ten billion dollars per year.[40] The profit margin is immense because the product is made cheaply, but sold with a highly inflated price. Magazines that cost about fifty cents to make are sold wholesale for five dollars and retail for ten dollars.[41] A twelve-minute pornographic movie cost about three dollars to make, but

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[37] *Id.* at 70.

[38] California Attorney General, Annual Report to the California Legislature: Organized Crime in California 1986 (1986) (unpublished) (cited as "1986 California Report"). An earlier Pennsylvania Crime Commission investigation determined that most of the adult bookstores in the Pennsylvania area were connected to one of three men who had close ties to organized crime families. Pennsylvania Crime Commission, A Decade of Organized Crime: 1980 Report, 119 (1980) (cited as "1980 Pennsylvania Report").

[39] Boston Globe Report at 1.

[40] 1986 California Report at 7.

[41] Pennsylvania Report at 118.

it retails for fifty dollars.[42] Accordingly, the sex industry has become the third largest source of income for organized crime in the United States today.[43]

Pornography also serves organized crime as a perfect money-laundering front. Since the sex industry has such a large volume of cash-flow, monies from other illegal activities can easily be laundered without detection.[44] The opportunity to skim profits for the pornography business to avoid taxation is yet another motive for organized crime figures to attempt to control pornography.[45] Combine these elements with lax law enforcement, and a perfect vehicle for organized crime is created.[46]

Organized crime involvement in pornography began in the late 1960's, when John Franzee began supplying and operating peep-show machines in pornography stores in New York City.[47] Organized crime was one of the few

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[42] Organized Crime Task Force Report at 227. Profit margins on other items can be as high as 3200 percent. Stanmeyer at 44.

[43] 1978 FBI Report, at b. Stanmeyer notes the connection between pornography and other sources of income for organized crime:

> Organized crime creams off immense profits from pornography. It uses millions of dollars in profits from magazines, movies, and other pornographic "entertainment" to finance narcotics deals and prostitution. Our society will not make much progress in the war against drug abuse, prostitution, and racketeering until we destroy the privileged financial sanctuary that is the pornography money machine.

Stanmeyer, at 39.

[44] 1983 Ohio Report, at 66; 1980 Pennsylvania Report, at 118.

[45] *Id.*

[46] The National Advisory Committee on Criminal Justice Standards and Goals in its 1976 Report concluded: "[Pornography] is a logical field for entry (by organized crime), given the facts of a prohibited product with a large market; susceptibility to good organization and muscle; and lax law enforcement." Organized Crime Task Force Report at 226.

[47] 1980 Pennsylvania Report, at 118; Boston Globe Report, at 30.

groups that was willing aggressively to market porn, as it did not fear the social stigma or legal problems resulting from occasional arrests for peddling obscene material.[48] Organized crime already had a nationwide distribution system, which aided their takeover. The 1980 California Attorney General's report traced how organized crime figures went from control of distribution to control of the industry itself:

> Once traditional organized crime controlled pornography distribution, it then took steps to control actual production of the material as well . . . . Thus, organized crime was able to consolidate and exercise its continuing monopoly in the illegal and legal hard core pornography product market. . . ." [49]

Today, organized crime figures are involved in all aspects of the pornography industry. This includes magazines, books, films, sexual devices, live sex shows, production, wholesale, retail, and distribution.[50] When a new porn shop opens, organized crime will immediately demand payments for "protection." [51] The usual pattern is that mob enforcers will visit a successful porn producer and ask for the distribution rights. If the producer refuses, the organized crime family will make pirated or

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[48] Boston Globe Report, at 7.

[49] California Attorney General's Report on Organized Crime (1980) at 32, *cited in* Boston Globe Report at 32.

[50] Stanmeyer at 43. Stanmeyer explains:

> Subjected to typical strong-arm tactics, the owners soon had to give organized crime 50 percent of their profits. From there, it was but a short step to insisting that all outlets use projection machines supplied by organized crime. By 1969, the Colombo family had obtained about 60 percent of the porno movies in New York.

Id. at 42.

[51] In the late 1970's, FBI agents, for example, started an undercover porn business in Los Angeles. Soon, three organized crime figures confronted the agents and attempted to extort money. 1978 FBI Report at c.

"bootleg" copies of the film and ruin the market for that particular film.[52] In addition, the mob will not hesitate to resort to violence if it feels that it is the most effective way to keep control of the industry.[53]

Most of the major pornography figures may be directly or indirectly linked to organized crime families. Reuben Sturman, for example, is widely recognized as the "king" of pornography in the United States—and possibly the world.[54] Sturman operates out of Cleveland, but he has close contacts with members of the DeCavalcante organized crime family of New Jersey.[55] Sturman's contact in the DeCavalcante family was, until recently, Robert DiBernardo. DiBernardo helped Sturman monopolize the

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[52] A classic example of the way organized crime figures move in on porn production is the story of the film "Behind the Green Door." In 1984, an independent film company, the Mitchell Brothers film Group Inc. of San Francisco, produced "Behind the Green Door", which starred Marilyn Chambers. The Mitchells were visited by James Bochis and Robert DeSalvo, two New York Mafia family associates, who said they wanted to distribute the film. The Mitchells refused; Bochis and DeSalvo responded by threatening that they would distribute bootleg copies of the film. In fact, hundreds of pirated versions showed up all over the country and the producers lost several key markets, including Las Vegas, Miami, and Dallas. The film got a bad reputation because of the poor quality of the bootleg copies. Finally, the Mitchells were forced to assign distribution rights to Michael Zaffarano of the Galante family for one of their next films. Boston Globe Report at 32, Organized Crime Task Force, at 227. Robert DeSalvo, who also provided evidence on behalf of the United States in a trial against other mob figures involving the distribution of the movie "Deep Throat," has been missing since January of 1976; he is presumed murdered. 1986 Pornography Comm. Report, at 1055-56.

[53] The violence includes bombing and shattering knees. 1986 Pornography Comm. Report, at 1057 (New York Hearing).

[54] 1983 Ohio Report, at 70; Boston Globe Report, at 32.

[55] An agreement existed in 1980 between the Gambino and DeCavalcante organized crime families to split up the pornography industry. Boston Globe Report, at 18.

eight millimeter porn film industry through strong-arm shakedowns of other dealers, distributors and suppliers throughout the United States, especially the West Coast.[56] Eventually DiBernardo became Sturman's enforcer; he disappeared in 1986, and, he is believed to have been murdered by rivals in the Gambino family.[57] James Fratianno confirmed Sturman's connections to the Gambino family, indicating Sturman paid protection money to Ettore Zappi, a captain in the Gambino family.[58]

Until his death in 1979, John Krasner was another major porn producer; he was based in Pennsylvania. His short career also well-illustrates the character of those who run the sex industry and the events that have come to be known as the "Pennsylvania Porn War." Krasner's empire encompassed at least Pennsylvania, New York, New Jersey, and Virginia. In addition, Krasner had porn interests in Florida and California[59] and connections with California pornographers Norman Arno and Theodore Gaswirth.[60] Arno and Gaswirth were connected with Robert DiBernardo of the DeCavalcante family and Michael Zaffarano of the Galente family of New York.[61]

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[56] 1978 FBI Report, at c.

[57] 1986 California Report, at 8.

[58] Boston Globe Report, at 32. Fratianno never said how much money was paid in total, but he did say that Sturman paid Zappi $200,000 once when Fratianno and others sent a representative to Cleveland to "rough up" Sturman. *Id.*

[59] 1980 Pennsylvania Report, at 119. Krasner began his porn empire with an $80,000 loan from an organized crime loanshark. *Id.*

[60] *Id.* Arno has also been identified with the Bonanno organized crime family. In 1986 California Report, at 11.

[61] 1980 Pennsylvania Report, at 119. Zaffarano functioned as the national coordinator for the various organized crime families in the 1970s. Boston Globe Report, at 30. Zaffarano was the highest-level organized crime figure originally indicted under the FBI's

Allen Charles Morrow was a Krasner employee, who set out on his own in the porn business. The break off was not friendly. Krasner employee Frank N. Beaver was stopped near Harrisburg, Pennsylvania with eighty-five pounds of explosives in his car. He was on his way to blow up a Collegeville, Pennsylvania pornography store owned by Morrow. Unfortunately for him, Beaver had just solicited the assistance of an undercover agent of the U.S. Treasury's Bureau of Alcohol, Tobacco, and Firearms.[62] Krasner was later charged with soliciting James Flood, another Pennsylvania man, to kill Morrow. Flood went to Morrow with the plan and offered to kill Krasner in a double-cross. Morrow went to the police with the story and Krasner was found guilty of solicitation of murder.[63]

While his case was on appeal, Krasner went to Fort Lauderdale, Florida. On February 6, 1979, Krasner was shot five times and killed. On May 29, 1979, Morrow was shot, but survived.[64] The "Pennsylvania Porn War" then ended.

Finally, a perfect example of success in pornography for organized crime is the film "Deep Throat," the most successful piece of pornography ever produced. Louis, Joseph, and Anthony Peraino were distributors of hard-core porn for the Colombo organized crime family.[65] The Colombo family put up $25,000 for "Deep Throat," and the Perainos were put in charge of its production.[66]

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undercover investigation, code named "MiPorn." He died of a heart attack less than one hour after Federal agents set out to arrest him. 1980 Pennsylvania Report, at 118.

[62] *Id.* at 120.

[63] *Id.*

[64] *Id.*

[65] Boston Globe Report, at 31.

[66] *Id.*

"Deep Throat" made up to $100 million at the box office alone.[67] That money was then used to buy yachts, limousines, and airplanes for the Colombo family and to further its myriad illegal activities, including drug smuggling in the Caribbean.[68] Not all of those who were associated with "Deep Throat's" production, however, profited; Joseph Periano's son was subsequently murdered in a turf war over the porn industry.[69]

CONCLUSION

This Court should find that the forfeiture provisions of the Indiana Rico statute may be constitutionally applied in civil or criminal cases when the predicate crime is "obscenity."

Respectfully submitted,

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[67] *Id.*

[68] 1986 Pornography Comm. Report, at 1052. Money from "Deep Throat" was used to develop Norman's Cay, one of the major drug smuggling bases north of the Panama Canal. *Id.* at 1060.

[69] *Id.* at 1056.